UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(Ft. Lauderdale Division)

Case Nos. 07-22459 & 08-21063 (COHN/SELTZER)

ELOY ROJAS MAMANI, et al.,

Plaintiffs,

v.

GONZALO DANIEL SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE,

Defendant,

JOSÉ CARLOS SÁNCHEZ BERZAÍN,

Defendant.

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs paint a vivid picture of the tragic, two-sided violent conflict that occurred in Bolivia in 2003. But they offer no material evidence about the individual circumstances of their decedents' deaths. They fail to address that police and soldiers were injured and killed on each of the days and in each of the areas in which the decedents died. Indeed, their own declarants confirm that police and military were beaten, shot, and killed amidst chaotic social upheaval, and switched to lethal ammunition only *after* their units had been attacked. They identify precisely what the Eleventh Circuit held precludes liability here, that there were "precipitate shootings that occurred during [a] civil uprising." *Mamani v. Berzaín*, 654 F.3d 1148, 1155 (11th Cir. 2011). They offer no evidence that the deaths were extrajudicial killings actionable under the TVPA, much less that Defendants are vicariously liable.

Plaintiffs attach twenty-one declarations and a slew of other exhibits to their Opposition. Hefty, to be sure. But largely, if not entirely, irrelevant and inadmissible at trial. Plaintiffs still do not provide a single eyewitness who can describe the persons who killed their decedents, under what circumstances they were shooting, or why they shot. So there is no evidence that any shooter of any decedent: was a soldier; took a deliberate shot, as opposed to an accidental or negligent or personally motivated shot; did not perceive himself to be under a threat from others; or was acting on orders. Just as the Eleventh Circuit found an inference of a deliberate shooting to be implausible at the motion-to-dismiss stage, *id.*, drawing such an inference on the current record would be entirely speculative. The evidentiary black hole precludes Plaintiffs' claims as a matter of law.

The Eleventh Circuit already has held—in this case—that "[f]acts suggesting some targeting are not enough to state a claim of extrajudicial killing." *Mamani*, 654 F.3d at 1155. The claims fail because "alternative explanations (other than extrajudicial killing) *for the pertinent . . . deaths* easily come to mind." *Id.* (emphasis added). And Plaintiffs offer no evidence that the

shootings were "linked to defendants" based on "what these defendants personally did," *id.*, or anything "sufficient to plausibly suggest that *their relatives' deaths* had been 'deliberate.'" *Mamani v. Berzaín*, 21 F. Supp. 3d 1353, 1374 (S.D. Fla. 2014) (emphasis added).

Plaintiffs also fail to establish vicarious liability. They rely primarily on command responsibility but provide no evidence that Defendants had "effective control" of the military. Defendants lacked authority to give operational orders to soldiers in Bolivia; that authority belonged to the Commander in Chief, a post that neither the President nor Minister of Defense held. Plaintiffs cite no case holding that high-level decision making by civilians is sufficient to state a command responsibility claim, much less in the context of a violent civil uprising.

I. Plaintiffs Must Prove Who Committed the Killing and Under What Circumstances

The Eleventh Circuit recently confirmed that a plaintiff cannot survive summary judgment on the record Plaintiffs have here. In *Hammett v. Paulding County*, 875 F.3d 1036 (11th Cir. 2017), the court considered a qualified immunity action where the plaintiff alleged that the police fired on him without justification. It affirmed summary judgment for the defendants because "[t]he bullet hole in the wall and the location of Hammett's wounds, by themselves, tell us essentially nothing about what happened. There are infinite possible permutations that would explain how the bullets ended up where they did during the brief and chaotic scuffle that occurred." *Id.* at 1050. The Plaintiff asked the court to infer that Hammett "surrendered and retreated," but the court rejected that because, "the assertion that he did is pure speculation." *Id*. It concluded, "the mere fact that the record, when viewed in the light most favorable to Plaintiff, is theoretically not inconsistent with [plaintiff's] narrative, is not enough to survive summary judgment." *Id.*

Plaintiffs fare no better. They ask the Court to make inference upon inference—infer that a soldier shot their decedents, then infer that the soldier took an intentional shot, then infer that the soldier knew he was shooting at an unarmed civilian and did not perceive himself to be under any

threat, and then infer that the soldier took the shot based on some order from Defendants as opposed to personal reasons. There is no evidence to support the first speculative inference, much less every inference thereafter. *See id*. at 1049-50 (though all reasonable inferences are drawn in the nonmoving party's favor, "an inference based on speculation and conjecture is not reasonable," and "though factual inferences are made in [Plaintiff's] favor, this rule applies only 'to the extent supportable by the record.'").

Plaintiffs attempt to shore up their case by providing four pages of legal citations. These citations serve only to highlight the evidence that they need but do not have. Every single cited case had either specific allegations on a motion to dismiss, or direct evidence in later proceedings, that the decedents were killed deliberately and by state actors.[1] And in each of the cases, the plaintiffs described precisely how the killing was connected to a soldier and a deliberate attack. Plaintiffs do not identify any case in which a claim proceeded based on the conjecture that the

[1] *See* Opp. at 12-16 (citing *Owens v. Rep. of Sudan*, 864 F.3d 751, 770 (D.C. Cir. 2017) (decedents were intentionally killed by a terrorist bomb); *Flanagan v. Islamic Rep. of Iran*, 190 F. Supp. 3d 138, 163 (D.D.C. 2016) (same); *Thuneibat v. Syrian Arab Rep.*, 167 F. Supp. 3d 22, 35-36 (D.D.C. 2016) (same); *Umetaliev v. Kyrgyzstan*, Comm. No. 1275/2004, U.N. Doc. CCPR/C/94/D/1275/2004 (Oct. 30, 2008) (six eyewitnesses saw militia in car intentionally shoot decedent); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & Shareholder Derivative Litig.*, 792 F. Supp. 2d 1301, 1354-55 (S.D. Fla. 2011) (paramilitary members intentionally killed decedents); *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995) (decedents were killed by Bosnian–Serb military forces "under [defendant's] command and with the specific intent of destroying [plaintiffs'] ethnic-religious groups"); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 420 (S.D.N.Y. 2002) (each plaintiff was killed by organized groups of members of the country's ruling party); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1537-38 (N.D. Cal. 1987) ("police and military officials" seized and killed plaintiff's family members); *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1469 (9th Cir. 1996) (killings were committed by military intelligence personnel); *Xuncax v. Gramajo*, 886 F. Supp. 162, 171 (D. Mass. 1995) (plaintiffs were tortured by "military forces under [defendant's] command"); *Gul v. Turkey*, App. No. 22676/93, Eur. Ct. H.R. (Dec. 14, 2000) (finding a human rights violation where evidence conclusively showed soldiers purposefully fired at least fifty shots at victim without justification); *Case of the "Caracazo" v. Venezuela*, Inter-Am. Ct. H.R. (ser. C) No. 58 (Nov. 11, 1999) (not an extrajudicial killing claim)).

military deliberately killed the decedent. This is notable given that Plaintiffs scoured cases in the United States *and* internationally.

Plaintiffs argue that the perpetrators need not "identify particular persons as the targets." Pls.' Opp. Defs.' Mot. Summ. J. ("Opp.") 12-13. Even if accurate, that claim is irrelevant. Plaintiffs must show proof that the decedents were killed extrajudicially and by a state actor—that lack of proof here warrants dismissal. In *Jaramillo v. Naranjo*, cited by Plaintiffs, the court *rejected* one plaintiff's claim because she did not plead sufficient facts to connect a state actor with the individual that killed the decedent. 2014 WL 4898210, at *12 (S.D. Fla. Sept. 30, 2014).[2]

Plaintiffs also claim that "this Court held that Plaintiffs had stated a claim for extrajudicial killings without any allegations as to the identity of individual shooters." Opp. at 14. To be sure, the Court did not require that Plaintiffs know the shooter's name. But the Court did require allegations that each decedent was killed by a "soldier." *Mamani*, 21 F. Supp. 3d at 1374-75. The evidence found sufficient in *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996), cited by Plaintiffs, is instructive by contrast. There a plaintiff established that, "militia shot down the door of his parents' home, hacked his parents to death with machetes and shot two of his brothers to death." *Id*. at *1.

II. There is No Evidence As to Who Killed the Decedents or Under What Circumstances

Plaintiffs must adduce sufficient evidence that "state actors" killed their decedents, in a "deliberate" fashion, "in the sense of being undertaken with studied consideration and purpose," and in a manner connected to Defendants. *Mamani*, 654 F.3d at 1155. Liability does not attach if

[2] The United States has not recognized killings of bystanders as an extrajudicial claim under international law, as Plaintiffs argue. Opp. at 13 n.8. Neither of the two State Department country reports makes such a statement. Moreover, the Eleventh Circuit's rulings concerning extrajudicial killings are the controlling precedent here.

the deaths "could *plausibly have been* the result of precipitate shooting during an ongoing civil uprising," or if "the alleged deaths *are compatible with* accidental or negligent shooting (including mistakenly identifying a target as a person who did pose a threat to others), individual motivations (personal reasons) not linked to defendants, and so on." *Id.* Plaintiffs adduce no evidence that their decedents were killed by state actors, much less deliberately or connected to Defendants.

A. Marlene Nancy Rojas Ramos, September 20, in Warisata

Plaintiffs point to four pieces of evidence in support of their claims concerning Marlene. CSMF ¶ 255.[3] None of it is eyewitness testimony to the shooting, and it confirms that soldiers did not shoot until *after* they were attacked and a soldier killed. *First*, Plaintiffs cite the declaration of Edwin Aguilar Vargas, a conscript who, starting on September 15, was working patrols in El Alto. During those five days of non-violent protests, the unit did not shoot. On September 20th, as his unit arrived in Warisata, he saw "tear gas and heard sounds of bullets or dynamite blasts or firecrackers." Resp. CSMF ¶ 243. Mr. Vargas does not say those came from the military; they could have come from protestors who were known to use dynamite and were armed in the area. SMF ¶¶ 44-52. Around 3:00 p.m., he saw that a member of his unit, Sergio Vargas Castro, was injured by a gunshot wound; he ultimately died. Resp. CSMF ¶ 243. Other evidence confirms, and Plaintiffs' experts concede, that armed civilians ambushed the military in Warisata. SMF ¶¶ 45-52.

Mr. Vargas's declaration is a rather sanitized version of his testimony at the Trial of Responsibilities. There, Mr. Vargas confirmed that an order to shoot occurred only after a fellow

[3] "SMF" refers to Defendants' Statement of Material Facts in Support of Their Motion for Summary Judgment. Dkt. 320. "CSMF" refers to Plaintiffs' Counterstatement of Material Facts. (Unfiled). "Reply SMF" refers to Defendants' reply to the portion of Plaintiffs' CSMF that responds to Defendants' SMF. "Resp. CSMF" refers to Defendants' reply to Plaintiffs' "additional facts" section of their CSMF.

soldier had been killed and police had been injured. "The police were shouting, we saw injured people [including police], and the police wanted us to shoot, but no, at that point we did not have the order." Resp. CSMF ¶ 243. When the order did come, it was not just to shoot anywhere, it was to shoot "to the hills," precisely where the gunfire hitting the police was coming from. *Id.* Mr. Vargas saw "people stationed in trees," *id.*, which corroborates military reports that individuals were shooting at the military from trees, SMF ¶ 45 ("crossfire was received from . . . people positioned in the trees"). And the scene was chaotic, particularly because the initial response was to use only tear gas: "there was much smoke and the [tear] gas that the police was throwing with the instructors, the wind was blowing against us, and we could not see anything.[4] We could hear the sound of dynamite" coming from in front of the trucks. Resp. CSMF ¶ 243. Soldiers initially "did not know which one of [their] comrades" had been killed because all those who had been fired on "were covered in blood." *Id.*

Amidst this chaos—with smoke from tear gas clouding views; the sounds of dynamite exploding near the soldiers; protestors stationed in trees and in the hills; injured police and a dead soldier—Mr. Vargas claims that a lieutenant ordered as follows: "Anyone who moved, we were to shoot below the belt. Anyone with dynamite or guns, we were to shoot above the belt." Resp. CSMF ¶ 250. Under the circumstances, an order to shoot *below* the waist, and above the waist only if the soldier can see that the individual is holding a deadly weapon, is incompatible with an order to kill unarmed civilians for no reason. *Id.* It is a defensive order. Whether that order went

[4] The fact that Mr. Vargas, "could not see anything" because of the "smoke and the [tear] gas" explains why he would not see the armed protestors identified in the State Department Cables, military diaries, and police reports. SMF ¶¶ 44, 45; Resp. CSMF ¶ 243. He further claims that in that same area where he could not see, he saw soldiers "shooting into houses and at windows." As found by the Bolivian Prosecutor's office, armed protestors were firing at soldiers "from local homes" in Warisata around the time Marlene was struck. SMF ¶ 44.

too far in terms of military defense makes no difference. This case is about extrajudicial killings, not the proper military response to an armed ambush. The order—as described by Mr. Vargas—shows that no soldier was ordered to kill unarmed civilians deliberately. And it cannot support a conclusion that a soldier shot Marlene or shot her deliberately, as opposed to someone shooting her accidentally or negligently or under the mistaken belief that she was a threat.

Second, Plaintiffs rely on Marlene's father Mr. Mamani, who conceded he did not see any soldier shoot towards his house. SMF ¶ 57. His speculative testimony that a soldier shot Marlene cannot be considered because he admits he did not see the shooting and was not even at home when it occurred. SMF ¶¶ 54, 57, 59. Based on what he did observe, he conceded that Marlene could have been shot: "By mistake, it could have been." SMF ¶ 59. And although he claims not to have seen any armed protestors in the hills, he conceded he was there for only a few minutes and that "there were whole areas" that he could not see. Resp. CSMF ¶ 255. For example, he did not see the police and soldiers get shot in Warisata. *Id*.

Third, Plaintiffs rely on Mr. Hayden, whose testimony is inadmissible and who, in any event, concedes that "armed protestors . . . were in the hills behind [Marlene's] home" and that it was possible for a shooter to "be shooting into the hills and accidentally shoot [Marlene's] house." Reply SMF ¶ 59.

Fourth, Plaintiffs refer to a ballistics report describing a 7.62 bullet, which is irrelevant because it makes no finding that that bullet struck Marlene. SMF ¶ 60. Also, armed protestors fired 7.62 bullets in Warisata that day—a police officer was shot with a 7.62 bullet. *Id.* ¶ 51.

B. Roxana Apaza Cutipa, October 12, Río Seco in El Alto

Plaintiffs offer no admissible evidence that Roxana was shot by the military. Hernán Apaza Cutipa testified he did not see his sister get shot, nor did anyone else. Resp. CSMF ¶ 297. He acknowledged that she could have been hit by a stray bullet. *Id.*; SMF ¶ 100. Indeed, he stated

there were "lots of people on the street" near the soldiers "that could have been hit instead [of his sister], yet they were not shot." Resp. CSMF ¶ 297.

Plaintiffs therefore rely on two other pieces of claimed evidence, neither of which supports their claim. CSMF ¶¶ 297-98. *First*, Plaintiffs assert that two additional bullets struck the terrace, but offer no bullets or other evidence of holes caused by bullets, much less by military bullets. Resp. CSMF ¶ 298. And that assertion does nothing to suggest that a soldier deliberately shot Roxana. Neither does Mr. Hayden's inadmissible testimony, *id.*, which confirms that the fatal shot could not have been deliberate. He conceded that only "a very well-trained sniper" could deliberately make such an "incredibly difficult shot," *i.e.*, 400 meters away, between intervening buildings, after sunset, and with only a part of Roxana's gray hat and head visible for a few minutes. SMF ¶¶ 93, 94. He admitted there is no evidence of any sniper on Juan Pablo II, much less "a very well-trained one." Reply SMF ¶ 94. Plaintiffs do not identify any evidence of a sniper on Juan Pablo II at that time or anywhere else. *Id.*

Second, Plaintiffs offer, but cannot rely on, the hearsay declaration of Roxana's brother, Guzmán, because he has been denied a visa to the United States and will not testify at trial. Resp. CSMF ¶ 297. He admits, "I did not see who shot Roxana." *Id.* He says nothing about who shot Roxana or why, *i.e.*, deliberately, accidentally, or at a perceived armed protestor on the roof. Notably, as Mr. Hayden acknowledged, the evidence shows "that there were armed protestors in the area" "on the roofs of buildings" "shooting down" at the military. *Id.*; SMF ¶ 95. Guzmán claims he could see soldiers shooting, but glaringly does not claim soldiers were shooting towards the building he and Roxana were in. Resp. CSMF ¶ 297. He does not state that he saw individuals who appeared to be snipers or any soldiers even using sniper scopes. *See id.*

C. Teodosia Morales Mamani, October 12, Río Seco in El Alto

Plaintiffs acknowledge that Beatriz Apaza Morales was hit by a bullet that passed "through a wall" of a second story residence. Opp. at 19. They identify no evidence to support the implausible scenario that a soldier shot at the wall intending to hit an unarmed civilian. In their first complaint, Plaintiffs made that very claim. Compl. ¶ 53, Dkt. 64. The Court dismissed it, because there were no alleged, "facts that would show some targeting, rather than an accidental or *negligent killing (e.g., a stray bullet that penetrated the wall).*" *Mamani v. Berzaín*, 2009 WL 10664387, at *17 (S.D. Fla. Nov. 25, 2009) (emphasis added). To "cure" this problem, Plaintiffs amended their complaint and omitted that the bullet went through a wall, alleging instead that "a soldier . . . fired at the apartment," killing Ms. Morales. Second Am. Compl. ¶ 113, Dkt. 156. On this basis, the Court denied the motion to dismiss her claims. *See Mamani*, 21 F. Supp. 3d at 1375.

Plaintiffs' amended allegations were a sham. Ms. Morales was, in fact, shot through a wall and Plaintiffs now admit that. Again. And there is no evidence that "a *soldier* . . . fired at the apartment." Plaintiffs offer only two pieces of evidence on that point: (1) the declaration of Ms. Morales, who was in a different room and did not see the shooter or the shooting, and (2) Mr. Hayden, whose testimony should be excluded altogether. CSMF ¶ 289.

Ms. Morales does not state that "a soldier fired at the apartment." Resp. CSMF ¶ 289. She states that when her father appeared at the window overlooking the street, soldiers pointed guns at him but *did not* shoot. *Id.* Instead, they asked, "Why are you looking?" *Id*. Given that shots had been fired from homes in the area, *id.* ¶¶ 287-88, it makes sense that soldiers would want individuals to stay away from windows. Likewise, when Ms. Morales's mother went outside yelling "Shoot me," the soldiers merely told her to go back inside. *Id.* ¶ 289. Ms. Morales states

only generally that *earlier* in the day she saw the military "firing on fleeing civilians," *id.* ¶ 288, but does not state that any civilian was hit, much less killed.[5]

From the limited view looking out her window, Ms. Morales admits that she saw hundreds of protestors in the Río Seco zone, but claims not to have seen any that were armed. *Id.* ¶ 288. Regardless of what one individual claims not to have seen, Ms. Morales cannot know if soldiers shot at what they perceived to be armed protestors, where police reports that same day observed: "[I]n the vicinity of the zone of Río Seco, groups of peasants . . . armed with Mauser rifles and carbines, started to attack the troops advancing in the direction from El Alto [to] La Paz from the tops of buildings and church bell towers in this area, [resulting in] the death of [a soldier]." SMF ¶¶ 83-84; Resp. CSMF ¶¶ 287-88.

Mr. Hayden's inadmissible testimony fares no better. His inspection of the bullet hole suggests that the shot was fired from a *downward* angle, which is flatly inconsistent with a shot fired from a soldier in the street below and consistent with an armed protestor firing from above. *See* Defs.' Mot. To Exclude Philip P. Hayden, Dkt. 314-1, at 16.

D. Marcelino Carvajal, October 12, Río Seco in El Alto

It is undisputed that no one saw soldiers shoot at Mr. Carvajal's home and no one saw who shot him. Mr. Carvajal's wife did not see any soldiers shooting. Resp. CSMF ¶ 296. Plaintiffs cite to declarations from Enrique Zabala and Wilson Soria, but these individuals saw no shooting at all; they state only that they heard gunshots and saw wounded individuals. *Id.* Mr. Zabala also says that he saw a Red Cross ambulance smashed by civilians because soldiers were inside and saw civilians beating a soldier behind the ambulance, *id.*, belying Plaintiffs' assertions that "[n]o

[5] When Mr. Hayden interviewed Ms. Morales, she made no mention about seeing soldiers shooting at fleeing civilians. Resp. CSMF ¶ 288. Ms. Morales did not agree to be deposed voluntarily and there is no indication she will testify at trial. *Id.*

witnesses saw . . . any civilian acting in a violent fashion" and that "there were no protestors on the street," Opp. at 19.

Ela Trinidad Ortega claims to have witnessed a soldier actually shoot a civilian (not Mr. Carvajal). Resp. CSMF ¶ 291. But this part of her declaration is a sham because it contradicts both the police statement she signed three weeks after the events and her testimony in the Trial of Responsibilities.[6] *Id.* She was asked in each instance to describe everything that she saw, and was specifically asked about any military shooting that day. *Id.* In neither did she make any mention whatsoever of seeing soldiers shooting civilians or other military, as she does now. *Id.* She said instead only that the soldiers, "mostly grabbed men," and that a soldier hit her. *Id.*

Her declaration, moreover, highlights a double standard that Plaintiffs apply when it comes to proximity. She describes what she observed near the Río Seco bridge, *id.*, a few blocks from Mr. Carvajal's house and where armed protestors were shooting at the military. *See supra* at 10. For Plaintiffs, this location puts the soldiers close enough to be the shooters; but it puts the armed protestors too far away to be "at the scene of Mr. Carvajal Lucero's death." CSMF ¶ 296. Plaintiffs cannot have it both ways. Either there is evidence of both soldiers and armed protestors shooting in the area of Mr. Carvajal's house, or there is no evidence at all as to who was shooting there.

Finally, Plaintiffs allege that two bullet holes close together in the wall of the house suggest "that both shots were targeted," but lay no foundation for that assertion. CSMF ¶ 296. Ms. Valencia de Carvajal acknowledged that she did not see the shots come in and no bullets were

[6] "The possibility that the declarant might change his sworn [ ] testimony and admit to the truth of the hearsay statement amounts only to a suggestion that admissible evidence might be found in the future, which is not enough to defeat a motion for summary judgment." *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1294 (11th Cir. 2012); *see also Spadaro v. City of Miramar*, 2013 WL 495780 (S.D. Fla. Feb. 7, 2013) (excluding statement that conflicted with prior sworn testimony as inadmissible hearsay at summary judgment for the same reason).

found in the house, so she has no way of knowing if the holes were made by bullets. Resp. CSMF ¶ 296. And photographs of two holes in a wall in 2006 prove nothing because no testing was done to determine they were caused by bullets fired in 2003. Resp. CSMF ¶ 296. Worse yet, Mr. Hayden admits he never even saw the holes when he visited the house. *Id.*

E. Lucio Santos Gandarillas Ayala, October 12, Senkata in El Alto

Plaintiffs do not identify any evidence at all regarding the circumstances of Mr. Ayala's death. They cite only the testimony of Luis Castaño—who saw a "man hit by a bullet." Opp. at 18. Mr. Castaño did not see who shot the man or under what circumstances. Resp. CSMF ¶ 284. And Mr. Castaño never identifies Mr. Ayala as the man he saw shot. *Id.* In fact, there are material discrepancies between the person Mr. Castaño saw shot and Mr. Ayala, including what part of the body was shot and where the body was found on the avenue. *Id.*

Plaintiffs try to link the man Mr. Castaño saw with Mr. Ayala through a new declaration from Ms. Villalobos, but the declaration does not even make that claim and only provides further evidence that the man Mr. Castaño saw was *not* Mr. Ayala. *Id.* Mr. Castaño's declaration states that the man he saw was "an older man." *Id.* Ms. Villalobos concedes that Mr. Ayala was only 33 years old at the time. *Id.*[7]

Plaintiffs do not rebut the substantial evidence that armed protestors were firing at the military in Senkata in the very area where they claim Mr. Ayala was shot. *See* SMF ¶¶ 80-81. They cite Mr. Castaño's assertion that he did not see any armed protestors within his limited field

[7] The declaration of Ms. Villalobos is a sham. She states now—for the first time in any testimony, including her testimony at the Trial of Responsibilities, and her deposition here—that Mr. Ayala was "wearing a colorful yellow, red, and green jacket and a red cap." Resp. CSMF ¶ 284. That belated attempt to match Mr. Castaño's declaration does not sufficiently connect the men given the other physical discrepancies between them.

of vision. *See* CSMF ¶ 284. One individual not seeing armed protestors does not create a genuine dispute about whether armed protestors were firing at the military.

F. Arturo Mamani and Jacinto Bernabé, October 13, Southern Zone of La Paz

As evidence that Arturo Mamani and Jacinto Bernabé—who were positioned atop steep hills overlooking the Southern Zone of La Paz—were shot on October 13th deliberately by the Bolivian military, Plaintiffs assert that neither decedent was armed and that soldiers were shooting into the hills. CSMF ¶¶ 311-12. But the declarations submitted by Plaintiffs confirm that soldiers only began shooting after a soldier was killed. *See id.*; SMF ¶¶ 119-22. Their declarant, Mr. Limachi, testified, "I was talking to my friend and fellow soldier, Edgar Lecoña, when I saw him fall down. . . . A bullet had entered his eye and exited his helmet in the back." Resp. CSMF ¶ 304. It was only after this that the unit changed to lethal ammunition. *Id*.

For days leading up to the morning of October 13, "[e]verything was peaceful" and "calm," *i.e.*, no shots at or by the military along the road as a military convoy travelled west from Uni towards Chasquipampa. *Id.* But then the convoy was forced to stop at a ditch protestors had dug in the road, where they were attacked by campesinos and heard a violent explosion. *Id.* Even then, the soldiers merely "took positions in a single file, with [their] rifles to scare the campesinos." *Id.* It was at that point that the soldier was shot through the head and killed. *Id.* Soldiers *believed* that shots had come from the hills and shot into the hills in response to that belief. *Id.* In fact, that very evening a soldier filed a police report accusing civilians who had been hiding in the hills of the murder of his fellow soldier and of attacking the convoy—one of the accused *is Plaintiffs' declarant Agustín Sirpa*. Resp. CSMF ¶ 302. That same police report notes that Mr. Sirpa conceded in a witness statement that, "one person carried a firearm (Mauser rifle)." *Id*.

The declarations establish that soldiers fired into the hills *after* and in the *same location* as the ambush and the killing of the soldier Edgar Lecoña. Reply SMF ¶ 114. Plaintiffs' own

evidence thus belies their argument that "[t]here is no testimony establishing the proximity of" the ambush to the hills were the decedents were shot, *e.g.*, CSMF ¶ 119. The declarations provide further evidence that the soldiers' actions were reactive, not deliberate. Although soldiers pursued campesinos into the hills, the declarants state that they passed unarmed civilians and did not shoot them; rather, once they found out that the "*campesinos* had already escaped"—*i.e.*, the ones they believed had attacked them—they retreated and "helped . . . injured civilian[s] climb down the hill." Resp. CSMF ¶ 305 (emphasis added). The declarations also show that soldiers shot into the air so as *not* to hit civilians, but rather to "frighten them," *id.*, further negating any inference of intent and introducing the possibility that individuals wounded in the hills could have been struck by one of these shots accidentally. *Mamani*, 654 F.3d at 1155.

G. Raúl Huanca Márquez, October 13, in Ovejuyo

Plaintiffs rely on a single eyewitness, Juan Carlos Pari, who claims to have heard a gunshot and seen Mr. Márquez fall down. Opp. at 21 (citing CSMF ¶¶ 313-14). This "eyewitness" provides no basis for concluding that the man he saw fall was Mr. Márquez. Although he identifies him by name, he provides no basis for *how* he knew the man was Mr. Márquez. Mr. Hayden—who interviewed Mr. Pari—confirmed that Mr. Pari did not identify or describe the man he saw shot at all. Resp. CSMF ¶ 314. Recognizing this defect, Plaintiffs remarkably rely on their own interrogatory responses as evidence that Mr. Pari could identify Mr. Márquez because he "later helped to transport Mr. Huanca Márquez's body to a nearby church." CSMF ¶ 314 n.13. Mr. Pari's declaration says nothing of the kind; to the contrary, he says that after he saw the man fall he "did not go out to help [him]." Resp. CSMF ¶ 314.

This claim also fails because Plaintiffs offer no evidence supporting an inference that Mr. Márquez was deliberately shot by a soldier. Mr. Pari did not actually see a soldier fire at the man he saw fall down, did not see any soldiers aim at the man, and did not see the man get hit by a

bullet. *Id.* According to Plaintiffs, the soldiers he saw were the ones who had just been ambushed, where the soldier was killed. CSMF ¶ 313 ("[T]he soldiers left the Animas valley in military trucks to head back to their barracks through the locality of Ovejuyo.").

H. There Is No Evidence of any Plan to Kill Civilians

Plaintiffs claim that Defendants had a plan in September and October 2003 to kill innocent civilians. But they offer no evidence of such a plan, or anything that links any decedent's death, to any such plan. The individuals who worked closely with Defendants in 2003—including two Cabinet Secretaries, the acting Commander-in-Chief of the military, an Army General, President Sánchez de Lozada's private secretary, his Chief Of Staff, a Congressman, and the Bolivian Ambassador to the United States—each testified unequivocally that they never heard from either Defendant any plan to kill civilians. SMF ¶ 34; Reply SMF ¶ 34. Despite investigating the events for fourteen years and scouring the Trial of Responsibilities testimony, Plaintiffs do not include any testimony that such a plan existed or was put into effect in 2003. Nor have Plaintiffs produced a single piece of paper reflecting such a plan.

The purported evidence does not support the existence of any plan. *First*, Plaintiffs claim that the "Sánchez de Lozada government" revised the Manual for the Use of Force and the Republic Plan to permit suppression of popular protest. CSMF ¶ 204. Neither document permits suppression of popular protest. Neither Defendant ever saw the documents, much less had any role in revising or implementing them. *See* SMF ¶¶ 181-82; Resp. CSMF ¶ 204. *Second*, Plaintiffs cite a declaration from someone who claims Defendant Berzaín said in 2001—before the 2002 election—that it would "be necessary to 'kill two or three thousand people.'" CSMF ¶ 197. He then states that "Sánchez de Lozada indicated that he approved of what Sánchez Berzaín said." *Id.*

¶ 7.[8] The declaration cannot be considered,[9] but even if it is, a stray comment at a meeting does not create a "plan." And there is no evidence that any "plan" was ever implemented when Defendants came to power a year and a half later. It is not even remotely plausible that such a plan existed with not a single person in the administration or military having heard about it. *Finally*, it would be speculative and circular reasoning to infer that the "alignment" of the deaths shows a purported plan to kill people. *See* CSMF ¶ 197. Indeed, the purported "alignment" assumes the basic facts that Plaintiffs cannot prove: the deaths were deliberate and committed by state actors.

I. Plaintiffs Cannot Reduce Their Declarations to Admissible Evidence

Declarations are admissible on summary judgment only if they can be reduced to admissible evidence at trial. Here, Plaintiffs have not made the required showing that the Bolivian declarants will appear at trial: many refused to make themselves available for deposition and two have already been denied visas to travel to the United States. *See Doe v. Drummond, Co.*, 782 F.3d 576 (11th Cir. 2015), *aff'g* 2013 WL 3873960, at *7 (N.D. Ala. July 25, 2013) (refusing to consider declarations at summary judgment in TVPA case where plaintiffs provided "no indication" that they would be available to testify at trial).

This failure cannot be an oversight. *First*, Plaintiffs sought to bring two declarants, Guzmán Apaza Cutipa and Hermógenes Bernabé Callizaya, to the United States to be deposed but they were denied visas. Resp. CSMF ¶ 297. They will not appear at trial. *Second*, certain of the

[8] The "[c]onclusory allegation[]" that Sánchez de Lozada "indicated," his assent, "[is] insufficient to create a genuine issue of material fact. *Valderrama v. Rousseau*, 780 F.3d 1108, 1112 (11th Cir. 2015). *How* he purportedly "indicated" assent is glaringly unstated.

[9] Mr. Canelas does not state that he is willing to testify to the declaration's contents, and on this basis alone it should be rejected. Resp. CSMF ¶ 197. Mr. Canelas is a member of Evo Morales's MAS party who threatened to "take revenge on Goni [President Sánchez de Lozada] and ruin his image everywhere." *Id.* A third-party deponent has testified that Canelas "is lying" about events described in his declaration. *Id.* Regardless, the Court need not make credibility determinations to reject a suspect declaration from an individual who will not commit to testifying at trial.

declarants, Apaza Mamani, Ron Davis, Roberto García Ortuño, and Juan Carlos Pari, refused to make themselves available voluntarily for deposition in Bolivia; it is unlikely they will voluntarily travel to Florida. CSMF ¶ 197. *Third*, Plaintiffs assert that many of the other declarants live in places that are difficult to access, making it extremely difficult to even contact them. Pls.' Mot. for Extension of Time, Dkt. 322, at 2, 5. It is unlikely that all, or any, will travel to Florida voluntarily. *Fourth*, some declarants have good reasons to refuse to subject themselves to jurisdiction here when testifying under oath. Some of the declarants' current statements directly contradict their prior sworn testimony. *See* Resp. CSMF ¶¶ 291, 315. One civilian declarant, Mr. Sirpa, was arrested for participating in the lethal attack on the military in the Southern Zone. *Id.* ¶ 302.

Most telling, however, is Plaintiffs' refusal to comply with the Court-sanctioned agreement "to provide each other with notice of individuals located abroad who are reasonably likely to appear for trial in Florida." Joint Rule 26(f) Report 5, Dkt. 229. Defendants repeatedly asked Plaintiffs to provide this information, Resp. CSMF ¶ 197, but they refused to do so contrary to the agreement filed in this Court. They still have not done so. The declarations should not be considered.

III. There Is No Evidence To Support Secondary Liability for Defendants

A. There Is No Evidence of Command Responsibility

Defendants cannot be liable under a theory of command responsibility. Plaintiffs rely heavily on a phrase from the TVPA's legislative history—that the law is meant to hold liable "anyone with higher authority who authorized, tolerated or knowingly ignored" unlawful acts.

Opp. at 24.[10] They suggest that this phrase governs the analysis. It does not. The Eleventh Circuit requires "the *actual ability* of a superior to control his troops," defined as "a *material ability to prevent or punish* [the] criminal conduct." *Ford v. García*, 289 F.3d 1283, 1290-91 (11th Cir. 2002) (emphases added). Plaintiffs cannot meet this standard on the record evidence.

No ability to prevent. The question here is whether the ability to give only general orders to engage the military—which is all President Sánchez de Lozada had, while Sánchez Berzaín did not have even that—is sufficient to establish effective control over the perpetrators of the alleged crimes. Plaintiffs' cited cases confirm that the answer is "no." Two cases, decided on a motion to dismiss, involved specific allegations that the defendants had operational, actual and legal authority over the very soldiers who committed the specific unlawful acts, far from the high-level authority at issue here. *See Jara v. Nuñez*, 2015 WL 8659954, at *3 (M.D. Fla. Dec. 14, 2015); *Jaramillo*, 2014 WL 4898210, at *13.[11]

Another case cited by Plaintiffs, *Yousuf v. Samantar*, 2012 WL 3730617 (E.D. Va. Aug. 28, 2012), highlights the type of evidence that is missing here. In *Samantar*, the defendant was the "primary military figure" in the government's regime with operational control over the perpetrators. *Id.* at *12. He admitted that he was present for the attacks and that commanders had to take directions from him. *Id.* He gave "the last ok . . . [h]ow to employ the units; it was [his]

[10] The same legislative history provides that "the bill would exclude lawsuits against higher officials having no connection to the torture." 137 Cong. Rec. 2671 (1991) (Sen. Specter).

[11] In *Jara v. Nuñez*, the defendant was a commanding officer who had the legal authority and practical ability to control the specific subordinates who tortured and killed the plaintiff at a mass detention center. Third Am. Compl. ¶ 53, 2015 WL 11257461 (M.D. Fla. Sept. 21, 2015). In *Jamarillo*, the perpetrators "operated under [the] direct command and direction" of defendant, who set the relevant policies and managed the daily affairs of the sub-unit at issue, and was under a legal duty to investigate, prevent and punish unlawful conduct committed by those under his direct command. Am. Compl. ¶ 46, 2013 WL 11036691 (S.D. Fla. Sept. 30, 2013). The third case merely lists the elements of command responsibility. *Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009).

task to give them directions and directives." *Id.* at *12. He personally made the decision to use heavy artillery to bombard a town filled with civilians. *Id.* at *13.

This case stands in sharp contrast. Plaintiffs rely instead on the baffling argument that the decrees here did not, "contain[] any instructions to minimize civilian casualties or protect civilian lives." Opp. at 8 (citing CSMF ¶¶ 278, 319). In other words, they argue that an American jury should be able to wordsmith lawful decrees issued by foreign officials. Not surprisingly, Plaintiffs do not cite any authority for the proposition that liability can attach because a lawful decree was not written specifically as a private litigant would desire. The only evidence they cite comes from Mr. Borrelli, who has never written a military order, much less a government decree, in his life, and has no experience with what should be contained in one. Reply SMF ¶ 162.

In any event, the undisputed evidence confirms that President Sánchez de Lozada had no authority or effective control over soldiers' actions. Plaintiffs cite his role as Captain General, but this granted him only the ability to issue high-level general orders to engage the military. And even then, Bolivian law further constrained his ability to engage the military only under certain scenarios. SMF ¶ 158. The existence of a Special Forces group that the President could engage, *see* CSMF ¶¶ 220, 230, 242, is irrelevant: (1) President Sánchez de Lozada was not even aware of this group; and (2) the Special Forces group was present only in Warisata, and could not have been involved in the only death there because it is undisputed that the unit was never ordered to use lethal force, and did not use any such force that day. Resp. CSMF ¶ 242. The presence of other troops in different areas, CSMF ¶ 333, is immaterial.

As to Sánchez Berzaín, the "evidence" is a combination of inadmissible and irrelevant materials that demonstrate nothing about effective control over the alleged perpetrators. For example, Plaintiffs assert without support that Sánchez Berzaín "dictated" the President's order to

engage the military to restore order in Warisata, CSMF ¶ 236, but the cited deposition testimony simply confirms that President Sánchez de Lozada spoke with Sánchez Berzaín before the order was prepared by legal counsel. Resp. CSMF ¶ 240.[12] Further, Plaintiffs misrepresent inadmissible testimony from the Trial of Responsibilities, stating that Sánchez Berzaín, "on behalf of Defendant Sánchez de Lozada, ordered the military to transport people from Sorata." CSMF ¶ 230. *The witness says the exact opposite*; Sánchez Berzaín "*did not intervene* . . . in the operation, which was still conducted by the police commander who was in charge, assisted by the military police commander."[13] Resp. CSMF ¶ 230.

Plaintiffs also mischaracterize the declaration of Mr. García as evidence that Sánchez Berzaín commanded the military operation in Sorata on September 20, 2003. Resp. CSMF ¶ 236. No deaths even occurred in Sorata, and the declaration does not support a finding of "command." According to the cited paragraphs, Sánchez Berzaín explained that "there *were* orders from the government to remove the tourists." CSMF ¶ 236. He allegedly told "the military officers to look for bus drivers to transport the tourists," but this is hardly an order, much less a military one, and certainly not an indication that Sánchez Berzaín had the ability to control the military's movements. Resp. CSMF ¶ 236.

The purported evidence is even weaker that Sánchez Berzaín had any effective control over the alleged perpetrators of the deaths in October. Plaintiffs rely on the Supreme Decree that

[12] The reports of guerilla activities referenced in the order are admitted by Plaintiffs' expert, Bjork-James, who confirmed the presence of members of the Tupak Katari Guerrilla Army (EGTK) in Warisata, as did a book written by EGTK member Felipe Quispe, who ordered other EGTK members to ambush the military there. SMF ¶ 50.

[13] Moreover, the testimony confirms that the trip to Sorata "follow[ed] a visit plan previously arranged . . . to visit units and observe the conditions of barrack infrastructure and unit houses," consistent with Sánchez Berzaín's administrative duties as Defense Minister. Resp. CSMF ¶ 230.

authorized gas tankers to bring fuel to La Paz, which had been choked off from receiving any gas during the uprising. CSMF ¶ 274. Plaintiffs mischaracterize the Supreme Decree as putting Sánchez Berzaín "in charge of the operation," *id.*, when it simply provided that the Minister of Defense would "establish the mechanisms necessary for its execution." SMF ¶ 161. That specific role is consistent with Sánchez Berzaín's administrative duties as the Minister of Defense. SMF ¶ 157. Nowhere does the Supreme Decree provide for his command of any operational matters.

Plaintiffs offer a declaration from Germán Loza, the former president of a gas station association, stating that Sánchez Berzaín grew angry and made inappropriate comments at a meeting the night before the Supreme Decree was issued. CSMF ¶¶ 275-76. They also cite the declaration as evidence that Sánchez Berzaín "approved of [a military] plan." CSMF ¶ 277. But the declaration states only that he "nodded" after a General said that the General would dispatch the military to take the tankers to Senkata. Resp. CSMF ¶ 277. Not a single case equates effective control of the military with "nodding" in response to a statement by a General.

No ability to punish. Plaintiffs do not—and cannot—dispute that the Attorney General and prosecutors who had the ability to investigate and punish military personnel were independent from the executive branch. SMF ¶ 184. That President Sánchez de Lozada "request[ed]" investigations does not change the fact that such investigations are independent from the executive branch. *Id.* Indeed, his request confirms that he was doing what little he could to ensure any unlawful conduct was prosecuted. Moreover, the timing of the events would not have allowed Defendants to punish unlawful acts even if they could have done so legally. All but one of the decedents died less than a week before Defendants were forced to leave Bolivia. Plaintiffs cannot credibly suggest that investigations could have been completed and punishments issued before

Defendants left office. Indeed, the investigations actually took place during the *ten months* after Defendants left office. *See* SMF ¶ 27.

Ultimately, it is undisputed that under Bolivian law and in practice, President Sánchez de Lozada could give only high-level orders *to engage* the military, and only when police were overwhelmed. Sánchez Berzaín had no authority at all over the military. As in *Belhas v. Ya'alon*, "[Plaintiffs] point to no case where similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute . . . extrajudicial killing under international law." 515 F.3d 1279, 1293 (D.C. Cir. 2008) (Williams, J., concurring). Permitting liability on this record would be the very type of "strict liability" for high-ranking national leaders that the Eleventh Circuit has soundly rejected. *Mamani*, 654 F.3d at 1154.

B. There Is No Evidence To Support Any Other Vicarious Liability

Plaintiffs' other claims of vicarious liability also fail. With respect to agency, Plaintiffs concede that consent is required between a principal and his agent, but offer no evidence that raises a dispute regarding such consent here. Opp. at 30. Nor could they, as those responsible for the deaths have not been identified. Plaintiffs state that the military hierarchy and soldier's participation in the alleged plan to kill civilians "taken as a whole" establish the requisite consent, but offer no evidence of soldiers' alleged participation in such a plan. Nor do Plaintiffs offer any evidence to create a dispute of fact as to the second prong, the principal's substantial control of the agents. *See supra* Part III.A. Finally, as to ratification, Plaintiffs disingenuously cite to "wide[] coverage" of the deaths in general—referencing CSMF ¶ 49, which points to deposition testimony regarding an article that showed *civilians* who were armed. Opp. at 32. Nowhere do Plaintiffs point to evidence that Defendants were aware that soldiers were unlawfully killing civilians, such that the Defendants had "full knowledge of all the material facts." *Nationmotor Club Inc. v. Stonebridge Cas. Ins.*, 2013 WL 6729664, at *15 (S.D. Fla. Oct. 29, 2013).

As to conspiracy, Plaintiffs attempt to raise a dispute regarding the first two elements—that two or more persons agreed to commit a wrongful act, and that Defendants joined the conspiracy knowing at least one of the goals of it and intending to help accomplish it. They rely on the inadmissible declaration of Victor Hugo Canelas, a well-known political enemy of the President. *See* Opp. at 29; *see also* Resp. CSMF ¶ 197. Even if admissible, it is not evidence of a purported agreement to commit the alleged wrongful acts. Mr. Canelas claims only that President Sánchez de Lozada "indicated" his agreement with something Mr. Berzaín said. Mr. Canelas does not state how he "indicated" this agreement—certainly there was nothing verbal. Otherwise, Mr. Canelas would have said so. Since Mr. Canelas is not a mind-reader, his conclusory assertion is insufficient to create a material disputed fact as to a conspiracy. *See Valderrama v. Rousseau*, 780 F.3d 1108, 1112 (11th Cir. 2015).

Plaintiffs also fail on the third element of conspiracy, an overt act taken in furtherance of it. They state, without support, that "Defendants took steps to implement their plan, by changing the rules governing military involvement in civilian protests and unleashing a campaign of military violence against civilians." Opp. at 29. The public safety law to which they refer, which modestly increased penalties for crimes committed in connection with violent protests, hardly constitutes a wrongful act. Moreover, Plaintiffs concede that it was *Congress*—not Defendants—that passed that law. CSMF ¶ 224. Plaintiffs also fail to dispute Defendants' testimony that they never even *saw* the Manual for the Use of Force or the Republic Plan before this litigation, let alone offer any evidence that they had any involvement with the creation or implementation of such military documents. CSMF ¶ 181, 182. And they fail to identify any specific wrongful act committed by anyone in the "conspiracy," or even who the alleged co-conspirators are other than Defendants.

IV. Plaintiffs Common Law Claims Fail as a Matter of Law

Plaintiffs cannot establish the intent requirement of their intentional wrongful death common law claims for the reasons stated above. Additionally:

Bolivian law. Bolivian law does not recognize indirect liability for a wrongful death claim. The closest theory appears to be a "mediate perpetrator"—but that specifically is not available for civil liability in Bolivia. SMF ¶ 191. Vicarious liability in the Trial of Responsibilities is irrelevant. Putting aside that the proceeding was hardly a model of due process, *see* Mot. To Exclude Material Re: Trial of Responsibilities, Dkt. 337, that was a criminal, not civil, trial.

Independently, the Bolivian law claims are precluded because Plaintiffs brought their civil claims before the criminal trial concluded. *See* Defs.' Br. at 34, Dkt 321-1. Plaintiffs cite no authority in opposition to this defense. Opp. at 33. Plaintiffs could have filed their Bolivian civil law claims in the United States after the Trial of Responsibilities ended. But they chose to file at a time when Bolivian law precluded them from pursuing civil claims.

Florida law. The Florida state wrongful death statute (which would apply Bolivian law), is preempted by the TVPA under field preemption. Plaintiffs cite general principles but offer no meaningful challenge or application of those principles. Opp. at 38-39. Instead, Plaintiffs misrepresent the cases they cite as rejecting Defendants' argument that the TVPA preempts a state wrongful death claim. *See* Opp. at 38. Not one of those cases does so.[14] Further, the wrongful death statute is preempted by the TVPA under the foreign affairs doctrine. Plaintiffs claim that

[14] *See Velez v. Sánchez*, 693 F.3d 308, 332 (2d Cir. 2012) (remanding on federal FLSA claim and therefore also vacating dismissal of related state labor law claims); *Jovic v. L-3 Servs., Inc.*, 69 F. Supp. 3d 750, 762 (N.D. Ill. 2014) (rejecting argument that TVPA and ATS preempted state law claims with no foreign implications); *Arias v. Dyncorp*, 517 F. Supp. 2d 221, 228 (D.D.C. 2007) (rejecting that a State Department initiative was intended to supersede state tort claims); *William v. AES Corp.*, 28 F. Supp. 3d 553, 574 (E.D. Va. 2014) (not considering preemption or the TVPA).

foreign affairs are not relevant here, even though the State Department would not permit a former Ambassador to be deposed precisely because of the foreign affairs implications of this litigation. Florida's weak interest in this case is easily outweighed by its foreign policy implications.[15]

V. Two Plaintiffs' Claims Fail for Independent Reasons

Plaintiffs concede that Ms. Villalobos and Mr. Mamani Aguilar did not personally seek or obtain the compensation available to them under the 2008 Humanitarian Assistance law. *See* Resp. CSMF ¶¶ 5, 10. Their failure to exhaust these remedies, as required by this Court and under the TVPA, requires dismissal of their claims.

Ms. Villalobos's claims also fail because she was never married to Lucio Gandarillas Ayala, the decedent on behalf of whom she brings this case. Plaintiffs do not dispute that under the Bolivian Constitution in effect in 2003, common law marriage that meets certain conditions "produce[s] effects *similar to those of* marriage," but not the same as marriage. CSMF ¶ 195. Instead, Plaintiffs ask this court retroactively to apply the definition of marriage under the Bolivian Constitution passed in 2009—six years after the death, and two years after this case began—without any basis under U.S. law. *See Cohen v. Shushan*, 212 So. 3d 1113, 1114-15 (Fla. Dist. Ct. App. 2017) (the question is whether the "couple was ever lawfully married under [the foreign] law . . . at the time of [decedent's] passing"). Accordingly, Ms. Villalobos's claims must be dismissed.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for summary judgment.

[15] Plaintiffs cite Part VI of *Doe v Exxon Mobil Corp.*, 654 F.3d 11, 70-71 (D.C. Cir. 2011). The D.C. Circuit has expressly vacated Part VI of that opinion. *See Doe v. Exxon Mobil Corp.*, 527 F. App'x 7 (D.C. Cir. 2013) (vacating "parts IV and VI of opinion").

Dated: January 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 12, 2018, I electronically filed the foregoing documents with the Clerk of the Court using CM/ECF. I also certify that the foregoing documents are being served this day on all counsel of record or parties of record on the Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Evan Berger
Evan Berger